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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 756

PERMANENTE STEAMSHIP CORPORATION,
Petitioner,

vs.

HENRY PETERSON

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

PERMANENTE STEAMSHIP CORPORATION,
Petitioner,

vs.

HENRY PETERSON

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, First Appellate District.

OPINION BELOW

The opinion of the District Court of Appeal (App. 1a-16a; R. 463-471) is reported in 129 A.C.A. 681,[1] 277 P.2d 495. Corrections are noted in 130 A.C.A. 259.

1. 129 Advance California Appellate Reports, 681. The opinion will be permanently reported in 129 Cal. App. 2d. .....

JURISDICTION

The judgment of the District Court of Appeal was entered December 17, 1954. A timely petition for rehearing was denied January 14, 1955 (R. 472; App. 17a). A timely petition for hearing by the California Supreme Court (Calif. Const., Art. VI, § 4c) was denied February 10, 1955 (R. 473; App. 18a), making the judgment that of the highest court in California in which a decision could be had (28 U.S.C., § 1257), and starting the 90 days within which to petition this Court for a writ of certiorari (28 U.S.C., § 2101(c); *American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21). Jurisdiction is invoked under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

46 U.S.C., § 375 requires the Commandant of the Coast Guard to establish all necessary regulations to carry out in the most effective manner the provisions of title 52 of the Revised Statutes[2] and declares that "such regulations shall have the force of law." Title 52, § 4412, of the Revised Statutes required the Board of Supervising Inspectors to establish such regulations to be observed by all steam-vessels in passing each other as they shall deem necessary for safety. 46 U.S.C., § 381 places the same duty on the Commandant of the Coast Guard (App. 20a).

Pursuant thereto the Commandant of the Coast Guard established 46 CFR, § 62.25(a),[3] providing that: "All vessels

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2. Title 52 of the Revised Statutes is entitled "Regulation of Steam Vessels."

3. Reference is to the 1949 edition of 46 CFR at pp. 548-549. In the Revised 1952 edition of 46 CFR see same regulation in §§ 78.30-1 and 97.27-1, pp. 552, 622. § 78.30-1 applies to passenger vessels; § 97.27-1 to cargo and miscellaneous vessels. Each reads: "*Lookouts required.* All ocean and coastwise vessels shall have a lookout at all times at or near the bow during the nighttime." (App. 21a)

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navigating the ocean during the nighttime shall have a lookout at all times at or near the bow."

On the night of February 27-28, 1951, Peterson was standing lookout on the bow of the S.S. Permanente Silverbow about 25 miles from Honolulu. The ship, pitching considerably at times, took an exceptional bounce causing him to fall against a hatch cover fastener and sprain his back. He sued under the Jones Act (46 U.S.C., § 688), contending the master, instead of obeying § 62.25(a), should have complied with an alleged custom and had him stationed on the bridge, 200 feet from the bow, where he would have been less affected by the ship's motion. The court below, applying what it felt was federal law, held his contention was for the jury to determine.

The questions presented are:

1. Is 46 CFR, § 62.25(a) only a regulation of the "internal discipline" of American vessels, or is it a safety regulation designed to prevent disaster at sea?

2. Does § 62.25(a) have the force of law or is it a mere prudential regulation disobeyance of which is discretionary with the master?

3. Does the master's duty to have a bow lookout under § 62.25(a) conflict with his duty under the Jones Act to provide seamen a reasonably safe place to work, or does it implement that duty? Would failure to carry a bow lookout at night breach the warranty of seaworthiness?

4. Does federal law allow a jury to substitute its standard of duty for that established by Congress and the Commandant of the Coast Guard in § 62.25(a)?

5. In order to nullify § 62.25(a), is testimony admissible that custom and good seamanship require the master to remove the lookout to the bridge when the ship is pitching because the lookout is safer there?

STATUTES AND REGULATIONS INVOLVED

Title 52, § 4412, Revised Statutes of the United States (2d edition, 1878, p. 854):

> "Sec. 4412. The board of supervising inspectors shall establish such regulations to be observed by all steam-vessels in passing each other, as they shall from time to time deem necessary for safety; two printed copies of such regulations, signed by them, shall be furnished to each of such vessels, and shall at all times be kept posted up in conspicuous places in such vessels."

46 U.S.C., § 375 (1952 edition, p. 6641):

> "§ 375: *Regulations of the Commandant.*
>
> "The Commandant of the Coast Guard shall establish all necessary regulations to carry out in the most effective manner the provisions of title 52 of the Revised Statutes, and also regulations preventing useless and unnecessary whistling, and such regulations shall have the force of law."

46 CFR, § 62.25(a) (1949 edition, pp. 548-549):

> "§ 62.25 *Lookouts, cabin watchmen, and fire patrolmen.*
>
> (a) All vessels navigating the ocean during the nighttime shall have a look-out at all times at or near the bow. Nothing in this section shall exonerate any master or officer in command from the consequences of any neglect to keep a proper look-out or the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

Pertinent provisions of the Jones Act, 46 U.S.C., § 688 (1952 edition, p. 6711), the Federal Employers Liability Act, 45 U.S.C., § 51 (1952 edition, p. 6480), 46 U.S.C., § 381 (1952 edition, p. 6641), 46 U.S.C., § 367 (1952 edition, p. 6638),

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and 46 CFR, §§ 78.30-1 and 97.27-1 (Revised 1952, pp. 552, 622), are set forth in the Appendix, infra, 19a-21a.

STATEMENT

The Permanente Silverbow is a 10,000 ton Victory ship (R. 49). Her bridge is 200 feet from her bow (R. 352).

She left Honolulu shortly after 10 p.m. February 27, 1951 (R. 63). She was empty of cargo but carried ballast aft (R. 242). At 11:28 p.m. she cleared the islands and set her first homeward course for San Francisco (R. 277, 343, 344).

The night was warm (R. 62, 142). No storm was in progress (R. 142, 158). The usual trade winds were blowing. There was a rough easterly sea and swells. The ship was pitching considerably at times (R. 345). Weather and seas were normal for the time and place (R. 345).

At 11:56 p.m. Peterson, in accordance with ship's routine, came on watch in the bow (R. 63, 467), relieving the previous lookout, one Jones (R. 67). Peterson took up a position 6 or 7 feet from the stem (R. 69, 137), far enough back so the wind did not hit in his face (R. 138). He wore glasses (R. 79). He faced forward scanning the seas at all times during the half hour before he fell (R. 141). Several times during this period he braced himself by holding to a fastener on the forepeak hatch cover. This was sufficient to steady him each time. He did not have to hang on continuously (R. 140). Anywhere on a vessel in rough seas it is necessary for a seaman to brace himself and hold on (R. 378, 379).

No spray was coming aboard (R. 66, 67, 80). No water was on the deck (R. 133). No seas were being shipped (R. 132, 133, 162, 307).

Suddenly an exceptional pitch of the vessel, described by Peterson as "that tremendous bounce," caused him to lose

balance and fall against the hatch cover fastener (R. 70, 74). The time was 12:25 a.m., February 28 (R. 31).

At 12:29 a.m. propeller speed was reduced from the normal 77 r.p.m. to 65 r.p.m. and then increased to 70 r.p.m. (R. 347, 248, 249). Such changes are customary in trying for a speed where the ship will ride easier (R. 249). Between 1:25 a.m. and 2:10 a.m. the No. 2 port and starboard tanks were filled with water (R. 249, 250), adding 380 tons to the ship's weight and sinking it 9 inches deeper in the water (R. 355, 356). The ship pitched and pounded thereafter (R. 200, 201). It bounced all the way back to San Francisco (R. 66). It is not possible to eliminate pitching and pounding (R. 66, 369).

Peterson was an experienced seaman (R. 106-108). He knew the lookout was required to be stationed in the bow at night (R. 165, 166). He went there as part of the normal ship's routine, without specific instruction to do so (R. 122, 467). There was a telephone to the bridge one step from where he stood (R. 143, 144, 196). He never reported he wanted to go to the bridge (R. 159, 160).

All lookouts stood in the bow the entire night of February 27-28 (R. 349). Except for Peterson's fall, no other lookout lost his balance or fell (R. 97, 179).

The jury returned a verdict for Peterson (R. 15). Judgment thereon (R. 13) was affirmed by the District Court of Appeal (R. 463-471).

The questions presented were first raised on petitioner's objections to testimony that custom, good seamanship, and the construction seamen put on 46 CFR, § 62.25(a), required the removal of the lookout to the bridge when the ship was pitching (R. 76-78, 104-106, 108-109, 196-197, 313-316, 330-331; App. 22a-29a). They were next raised by a motion for directed verdict which was denied (R. 405, App. 29a), and

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following that on exceptions[4] to instructions that the law allows in evidence the opinions of experts and that the jury should find in favor of the expert testimony regarding customs of the sea which in their opinion was entitled to the greater weight (R. 420; App. 29a-30a), and that the defendant owed its employee a continuing duty to provide him with a reasonably safe place to work (R. 414, 415; App. 30a). They were next raised by an exception to the jury's verdict,[5] by a motion for a new trial which was denied (R. 20-35), by appeal to the District Court of Appeal which affirmed the judgment (R. 463-471; App. 1a) by a petition to that court to rehear the cause which was denied (R. 472; App. 17a) and by a petition for hearing by the California Supreme Court which was denied 4-3 (R. 473; App. 18a).

The court below indicated 46 CFR, § 62.25(a) was only a regulation of the "internal discipline" of American vessels (App. 2a) and without citing 46 U.S.C., § 375, questioned whether in a civil suit for damages § 62.25(a) was a rule of law at all.[6] It went on to hold that, regardless of § 62.25(a), the "preference of the United States Supreme Court for jury decisions in Jones Act and Federal Employers Liability Act cases," as exemplified in *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, and *Anderson v. Atchison, T. & S. F. Ry. Co.*, 333 U.S. 821, required a jury determina-

4. California Code of Civil Procedure, § 647, provides that the giving of an instruction is deemed to have been excepted to.

5. California Code of Civil Procedure, § 647, provides that the verdict of the jury is deemed to have been excepted to.

6. The court below stated that petitioner's instruction that 46 CFR, § 62.25(a) did "have the force of law" was "in its unmitigated form, possibly too favorable to appellant." (App. 14a-15a) It used such expressions as, "But even if it is conceded that said regulation has the force of statutory law" (App. 3a), "even if regulation 62.25(a) governs in this case" (App. 5a), and "there is here no plain, uninfringible rule of law, if ordinance 62.25(a) is a rule of law governing civil responsibility at all." (App. 11a)

tion of the question: "would a reasonably prudent superior, because of his duty to guard the reasonable safety of the sailor, under the circumstances proved have departed from the rule that the lookout should be in the bow? * * * A right to deviate under special circumstances for the safety of the lookout must be recognized and under what circumstances a reasonable master would deviate and whether these circumstances are present is a jury question. * * * Appellant contends that under federal rule here applicable the case should not have gone to the jury, citing *Brady v. Southern Ry. Co.*, 315 U.S. 476. It is true that what should be submitted to the jury in the Jones Act and Federal Employers Liability Act cases (like the *Brady* case) is considered a federal question. * * * The question whether in this case the matter was for the court or jury must be decided according to federal law. * * * The above cases show a tendency to eliminate as much as possible questions of law and to treat the whole matter as a question of conduct of a reasonable man for the jury." (App. 6a, 10a-13a).

As a corollary the court below held that, notwithstanding the statutory standard of duty established by § 62.25(a), "evidence as to customary standards of conduct is admissible," and "evidence is admissible as to what good seamanship required under the circumstances of the case." (App. 13a). It conceded that testimony as to how seamen construe § 62.25(a) should not have been admitted, but held it did no harm (App. 14a-16a).

REASONS FOR GRANTING THE WRIT

Federal statutes, and a federal regulation with the force of a federal statute, are involved. The court below has decided federal questions of substance in a way not in accord with applicable decisions of this Court.

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1. 46 CFR, § 62.25(a) was enacted "to protect the safety of life and property and to minimize disaster at sea."[7] The court below erroneously construed it as only a regulation of the "internal discipline" of American vessels (App. 2a). This view conflicts in principle with *O'Hara v. Luckenbach S.S. Co.*, 269 U.S. 364, 368. There it was held that 46 U.S.C., § 673, requiring division of ships' crews into watches, was a safety regulation, not simply a regulator of working conditions. This Court said (p. 368):

> "But the provision, fundamentally, is a measure of precaution against those perilous and often unexpected emergencies of the sea when only immediate and wakeful readiness for action may avert disaster or determine the issue between life and death; its effect as a regulator of working conditions is a matter of subordinate intent."

The contrary conclusion of the Ninth Circuit Court of Appeals in 1 F.2d 923 was reversed. See also, *Buttimer v. Detroit Sulphite Transp. Co.*, 39 F. Supp. 222, 226, following *O'Hara* and stating: "The thing Congress had in mind was not the regulating of working conditions, but the factor of safety at sea."

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2. 46 CFR, § 62.25(a) is declared by Congress to "have the force of law" (46 U.S.C., § 375). The court below failed even to cite 46 U.S.C., § 375, repeatedly questioned whether

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7. *Ace Waterways v. Fleming*, 98 F. Supp. 666, 668, construing Chapter 14 of Title 46 of the United States Code (§§ 361-440) entitled "Inspection of Steam Vessels," which is a codification of Title 52 of the Revised Statutes of the United States (§§ 4399-4500), which in turn is a revision of the Act of Feb. 18, 1871, entitled "An Act to Provide for the better Security of Life on board of Vessels propelled in Whole or in Part by Steam, and for other Purposes." (16 Stat. 440)

§ 62.25(a) was a rule of law at all,[8] and held that obedience to § 62.25(a) was discretionary with the master, and that the jury was entitled to find that such obedience was a fault. State courts cannot thus override Acts of Congress (*Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. ....., 99 L.ed. (Advance p. 281 at p. 285). The view of the court below is in conflict with *Belden v. Chase*, 150 U.S. 674, 698-699. There this Court construed the rules of the Board of Supervising Inspectors established under § 4412 of Title 52 of the Revised Statutes which had been denied obligatory force by the New York courts. This Court said (p. 698):

> "In addition to the rules for preventing collisions, prescribed by section 4233,[9] it was provided by section 4412 that 'the board of supervising inspectors shall establish such regulations to be observed by all steam-vessels in passing each other, as they shall from time to time deem necessary for safety.' The rules laid down by the latter as thus authorized have the force of statutory enactment, and their construction, (when put in evidence as they were in this case,)[10] as well as that of the rules under Section 4233, is for the court, whose duty it is to apply them as a matter of law upon the facts of a given case. They are not mere prudential regulations, but binding enactments, obligatory from the time that the necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remains. The Dexter, 23 Wall. 69. Obviously they must be rigorously enforced in order to attain the object for which they were framed, which could not be secured if the masters of vessels were per-

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8. Note 6, supra.

9. This reference is to § 4233 of Title 48 of the Revised Statutes entitled "Regulation of Commerce and Navigation," containing rules of navigation directly enacted by Congress.

10. The regulations of the Commandant of The Coast Guard, as incorporated in the Code of Federal Regulations, are now judicially noticed (46 U.S.C. §§ 307, 311(a)).

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> mitted to indulge their discretion in respect of obeying or departing from them."

And at p. 699 (150 U.S.):

> "Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules."[11]

The contrary determination in 16 N. Y. St. Rep. 28 and 117 N. Y. 637 was reversed because "the obligatory force of the rules of navigation was substantially ignored" (150 U.S. at p. 703), and because that determination amounted "to a decision against rights claimed under the statute of the United States." (150 U.S. at p. 700)

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3. The court below erroneously read into federal law a conflict between the master's duty to furnish a reasonably safe place to work under the Jones Act and his duty to have a bow lookout under § 62.25(a). It stated: "The duty to furnish a reasonably safe place to stand watch was a duty which the master had to *weigh against* the duty under the ordinance. * * *" (App. 15a; italics added.)

There is no conflict. § 62.25(a) implements the former duty. It was established to promote safety at sea. It protects the lookout himself. Its violation would be both negligence and a breach of the warranty of seaworthiness (*Boudoin v. Lykes Brothers Steamship Co.*, 348 U.S. ....., 99 L. ed. [Advance p. 296]).

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11. In accord: *The Brittania*, 153 U.S. 130, 143-144; *The H. F. Dimock*, 77 Fed. 226, 229-230; *The Lauretta Speddin*, 184 Fed. 283, 286; *The Stifinder*, 275 Fed. 271, 277.

Congress and the Commandant of the Coast Guard have already "weighed the conflicting interests at stake."[12] They know that the ocean is rough and that vessels pitch. They have nevertheless determined that a ship without a bow lookout is not worthy to steam the seas at night. To paraphrase and quote from *Boudoin*, a vessel bursting at the seams might well be a safer place than one steaming at night without a bow lookout. In applying the warranty of seaworthiness there is "no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other." (348 U.S. ....., 99 L. ed. [Advance p. 296 at p. 299]).

In *British Columbia Co. v. Mylroie*, 259 U.S. 1, 7, it is said, quoting from *The Ariadne*, 13 Wall. 475, 478:

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide."

And at p. 6 (259 U.S.):

> "We agree with the Court of Appeals that this was a case where a lookout should have been stationed at the bow and that the difference in position between

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12. Judge Learned Hand in *Martin Transp. Co. v. J. A. Robson*, 135 F.2d 325, 328, col. 1, top, distinguishing a rule of navigation from a custom. Judge Hand there states:

> "When we decide that a custom has been proved, it is never a precedent; on other testimony the same judge might find that the custom did not exist; on the same testimony another judge might find that it did not; we should affirm each without the least inconsistency. A rule of navigation is different; an official with proper authority, having weighed the conflicting interests at stake, fixes an accommodation between them which he deems right, and attaches his sanction to it; his fiat makes it imperative."

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those in the wheelhouse[13] and the man at the bow would have offered greater opportunity to pick up the land by either the one or the other than where the eyes of the tug were in the wheelhouse only."

Considerations for the lookout's welfare "must yield, as they have always yielded, to the paramount necessity of safety while the ship is at sea." (*O'Hara v. Luckenbach S. S. Co.*, 269 U.S. 364, 367). Standing bow lookout in rough seas is a necessary sailing duty. (*The Belgenland*, 114 U.S. 355, 372) Heavy seas are "obvious and well known risks of the business" of all seamen,[14] "one of the risks of the sea that every crew takes" (*Boudoin v. Lykes Brothers Steamship Co.*, supra). "No liability flows from requiring a sailor to perform his necessary sailing duties with the ship rolling and lurching in a heavy storm, even though he may be injured from a fall caused by a wave sweeping across the deck." (*Matson Navigation Co. v. Hansen*, 132 F.2d 487, 488)

But one of the risks that a seaman does not take is that the master will steam at night without a bow lookout (*Boudoin v. Lykes Bros. Steamship Co.*, supra, 348 U.S. ....., 99 L. ed. [advance p. 296 at p. 299]). Federal statutes have ordained that seamen shall not take that risk (46 CFR, § 62.25(a); 46 U.S.C. §§ 375, 381).

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4. The court below erroneously held that the trial court and jury could override the statutory standard of duty imposed on the master by Congress and the Commandant of the Coast Guard (46 CFR § 62.25(a); 46 U.S.C. §§ 375, 381), and substitute instead a so-called reasonable man standard.

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13. The wheelhouse was 40 feet from the bow.

14. *Repsholdt v. United States*, 205 F.2d 852, 855-856; *The Iroquois*, 194 U.S. 240, 243; *Roberts v. United Fisheries Vessels*, 141 F.2d 288, 292-293; *Maloney v. United States*, 7 F. Supp. 14, 16.

This view conflicts in principle with *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471, 474. There this Court, construing an I.C.C. regulation and reversing 7 Cal. 2d 181, held (p. 474):

> "The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and the jury cannot be substituted for that of the commission."

It is similarly in conflict with *The Pennsylvania*, 19 Wall. 125, 137, where it is recognized that a court cannot substitute its own standard of duty for that adopted by Congress. The Court there stated (p. 137):

> "It may be assumed, therefore, that the legislature acted under the conviction that a foghorn could be heard at a greater distance than a bell, and required the use of one rather than that of the other for that reason. To go into the inquiry whether the legislature was not in error—whether in fact a bell did not give notice to the steamer that the bark was where she was as soon as a foghorn would have done—is out of place. It would be substituting our judgment for the judgment of the law making power. It would be admitting the validity of an equivalent for that which the statute has made a positive requirement."

The decisions of this Court relied upon by the court below, *Dice v. Akron Etc. R. Co.*, 342 U.S. 359, and *Anderson v. Atchison, T. & S. F. Ry. Co.*, 333 U.S. 821, are not contrary. Neither involved a statutory standard of duty. In *Dice* it was held that in an F.E.L.A. case federal law governed the questions whether a release was obtained by fraud and

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whether a jury should make that determination. In *Anderson* a judgment on the pleadings was reversed, the Court holding that a complaint alleging a railroad's failure during cold weather to make any effort to locate a trainman missing from the train on which he was employed, stated a cause of action for negligence under the F.E.L.A.

The third case relied upon, *Pierro v. Carnegie-Illinois Steel Corp.*, 186 F.2d 75 (App. 13a), held that the question whether a master's *disobedience* of a Coast Guard inspection certificate constituted negligence, was a jury question. The lower court's reasoning—that if disobedience of a Coast Guard regulation may constitute negligence, so may obedience thereto—is fallacious and contrary to federal law (*Belden v. Chase*, supra, 150 U.S. 674, 699; *Atchison, T. & S. F. Ry. Co. v. Scarlett*, supra, 300 U.S. 471, 474).

Circumstances can be imagined where it would be absurd to maintain a bow lookout, e.g., if conditions were such that he would drown or freeze to death there (*The Kaiserin Maria Theresa*, 149 F. 97). § 62.25(a) will not be construed so as to lead to absurd consequences (*United States v. Bryan*, 339 U.S. 323, 338; *United States v. Brown*, 333 U.S. 18, 27). But its construction "is for the court, whose duty it is to apply [it] as a matter of law upon the facts of a given case" (*Belden v. Chase*, supra, 150 U.S. 674, 698). Being a statute aimed at promoting the safety of ships at sea,[15] it is to be liberally construed to that end (*Urie v. Thompson*, 337 U.S. 163, 182). Its application to the facts of this case involves no absurdity. The court below, in eschewing its duty so to decide, is in conflict with *Belden v. Chase*, supra,

15. The question in this case does not reach the issue whether considerations for the lookout's safety prevail over those for the safety of the rest of the crew. For that which makes the ship safe for the rest of the crew, makes it safe for the lookout as well.

150 U.S. 674, 698, and with the decisions of this Court holding that in F.E.L.A. and Jones Act cases a directed verdict is required when there can be but one reasonable conclusion as to the verdict (*Brady v. Southern Ry. Co.*, 315 U.S. 476, 479-480; *De Zon v. American President Lines*, 318 U.S. 660; *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573).

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5. The court below erroneously held that, under federal law, opinions of seamen that custom of the sea and good seamanship require the lookout to be stationed on the bridge if the ship is pitching, is admissible to override the statutory bow-lookout rule. This view conflicts in principle with *Richlieu & Ontario Navigation Co. v. Boston Marine Ins. Co.*, 136 U.S. 408. There, there was no lookout forward. The statute involved required a moderate speed in fog and a "proper lookout." Objection to the following question was held properly sustained: "What is the custom of Canadian vessels about carrying a lookout forward?" This Court said (p. 435):

> "Evidence of a custom to run full speed in a dense fog, without a lookout, and contrary to the statute, would be clearly inadmissible and would be of no avail if established."

See also *Vermilye v. Adams Express Co.*, 21 Wall. 138, 146:

> "If they have been in the habit of disregarding that law, this does not establish a different law."

In *The Tilicum*, 217 Fed. 976, 978, a custom for the lookout to stand just forward of the pilothouse was held inadmissible to overcome a pilot rule requiring him to stand at the bow. The court said (p. 978):

> "It is immaterial what the custom in the operation of the boats is, if the custom is contrary to law. If a

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> custom could obtain over the law, navigators could very readily overcome an Act of Congress by agreeing upon a rule and adhering to it for such a time as to develop a custom. Such cannot be the law."[16]

Violation of the judicially established bow-lookout rule[17] (as distinguished from the statutory rule) raises the same presumption of contributory fault "as that created by the violation of a statute and must be overcome, if at all, by the same kind of proof showing that the violation could not have contributed to the disaster," (*The Adrastus*, 190 F.2d 883, 886), to wit, by "testimony conclusive to the contrary." (*The Ariadne*, 13 Wall. 475, 479). This strict presumption of fault "is a product of a philosophy peculiar to United States admiralty law, that disasters are likely to occur when statutes passed for the express purpose of promoting safety in navigation are violated" (*Pierro v. Carnegie-Illinois Steel Corp.*, 186 F.2d 75, 78). The suggestion of the court below that the bow-lookout rule is not a rule of true navigation (App. 5a), is thus clearly contrary to federal law.

In *The Belgenland*, 114 U.S. 355, 372, the excuse for not having a bow lookout that "the vessel was plunging into a head-sea, and taking so much water over her bows that he would have been of no use there," was summarily rejected and liability imposed on the offending vessel.

In *The Machioneal*, 243 F. 801, 805, it was held no excuse

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16. To like effect: *The Lafayette Lamb*, 20 Fed. 319, 322; *Occidental & O. S.S. Co. v. Smith*, 74 Fed. 261, 268; *The Alfred W. Booth*, 127 Fed. 453, 455; *The Transfer No. 10*, 137 Fed. 666; *The Morristown*, 278 F. 714, 716; *The Michael Tracy*, 43 F.2d 965, 966; *The Richard J. Barnes*, 111 F.2d 294, 296.

17. *St. John v. Paine*, 10 How. 557, 585; *Chamberlain v. Ward*, 21 How. 548, 571; *Haney v. Baltimore Steam Packet Co.*, 23 How. 287, 293; *The Colorado*, 1 Otto. 692, 698; *The Belgenland*, 114 U.S. 355, 372; *British Columbia Co. v. Mylroie*, 259 U.S. 1, 6-7.

for violating the bow lookout rule "that a vessel is so constructed as to make that position uncomfortable."

And in Griffin on Collision, p. 273: "It is no excuse for failure to have a lookout properly placed that weather conditions make it inconvenient or uncomfortable."

The bow-lookout rule was judicially established by this Court long before it became a statutory duty.[18] The Court below, in admitting evidence as to alleged custom and good seamanship, has overridden the rule of this Court as well as Acts of Congress. In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. ...., 99 L. ed. (Advance p. 281 at p. 285), this Court said:

> "* * * in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress."

An occasional court, to avoid a miscarriage of justice, has struggled to exonerate a master from the presumption of contributory fault arising from his disobedience of the judicially established bow-lookout rule (*Oriental Trading & Transport Co. v. Gulf Oil Corp.*, 75 F. Supp. 935, affirmed, 173 F.2d 108).

Reasoning from such cases, the court below reaches the conclusion that evidence of a custom to disobey the statutory rule (46 CFR, § 62.25(a)), sanctioned by Congress (46 U.S.C., §§ 375, 381), is admissible to prove negligence. This is a non sequitur and contrary to federal law. (*Belden v. Chase*, supra, 150 U.S. 674, 699; *Atchison, Topeka & Santa Fe Ry. Co.*, supra, 300 U.S. 471, 474; *Richlieu & Ontario Navigation Co. v. Boston Marine Ins. Co.*, supra, 136 U.S. 408, 435).

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18. See cases cited in note 17, supra.

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6. The erroneous judgment below affects every vessel flying the American Flag and jeopardizes the integrity of federal safety statutes. That error is the result of the lower court's mistaken conclusion that federal law, as expounded in two recent decisions of this Court,[19] requires that a jury be allowed to nullify these statutes. For this Court to allow the judgment to stand "would risk affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so" (*Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 443).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

CYRIL APPEL
GEORGE LIEBERMANN
Attorneys for Petitioner

April 1955.

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19. *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359; *Anderson v. Atchison, Topeka & Santa Fe Railway Co.*, 333 U.S. 821. The court below twice noted that in *Anderson* the judgment of the California Supreme Court in 31 Cal. 2d 117 was reversed (App. 11a, 12a).

(Appendices Follow)

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Appendix A

In the District Court of Appeal of the State of California
First Appellate District, Division Two

Civil No. 16034

Henry Peterson,
Plaintiff and Respondent,
vs.
Permanente Steamship Corporation,
Defendant and Appellant.

This is an action for damages for personal injuries under the Jones Act (46 U.S.C.A. § 688) which makes available such action at law based on negligence to a seaman injured in the course of his employment. The defendant appeals from a judgment on a verdict of $6000 for plaintiff.

The complaint alleged in substance that plaintiff on February 28, 1951, when in the course of his employment he was standing lookout watch on the forecastle head of the steamship Permanente Silverbow, owned and operated by defendant, was thrown down and against the forepeak hatch cover of said vessel and injured because of the violent pounding of the ship and the sudden rising and falling of the forecastle. Negligence was predicated on negligently ordering plaintiff to stand lookout watch on the forecastle head under conditions then prevailing and on negligently navigating the vessel.

Appellant urges as grounds of appeal:

(1) The evidence does not sustain the allegations of negligence, a directed verdict should have been granted, and the case should not have gone to the jury.

(2) Erroneous admission of testimony as to opinion, custom and usage that when a ship pitches and pounds the lookout should be stationed on the bridge.

(3) Error in instructing the jury (a) to decide from the conflicting expert testimony what the custom of the sea was as to where the lookout should stand, and to find in favor of the expert testimony entitled to the greater weight; (b) that defendant owed plaintiff the duty of furnishing him a reasonably safe place to work, and (c) that the Jones Act allows recovery for any defect or insufficiency of the employer's appliances, boats or equipment.

These grievances are for a large part based on the contention that under section 62.25(a) of the shipping regulations established by the Commandant of the Coast Guard in effect at the time of the accident (46 CFR 62.25(a)) "All vessels navigating the ocean during the night time shall have a lookout at all times at or near the bow," that said rule is obligatory, that no departure from it is authorized and that compliance with said rule cannot constitute negligence. In Griffin on Collision, p. 262, note, it is said with respect to this provision: "It would seem that this provision as to lookouts is to be regarded as a regulation of the internal discipline of American vessels rather than as a collision rule governing civil liabilities." This statement is to some extent borne out by the fact that no case has been cited to us in which this rule is mentioned with respect to liability for not having the required lookout, notwithstanding the fact that the rule has existed at least since 1931, when it was section 25 of Rule V, General Rules and Regu-

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lations, Ocean and Coastwise, Board of Supervising Inspectors (Bureau Marine Inspection and Navigation) of March 2, 1931. But even if it is conceded that said regulation has the force of statutory law influencing civil liability as is accepted in Belden v. Chase, 150 U.S. 674, 698, for navigation rules made by the board of supervising inspectors this would not mean that no departure from this rule can be permitted under special circumstances, even if the right to such departure is not expressly stated. The rule contains a further provision reading: "Nothing in this section shall exonerate any master or officer in command from the consequences of any neglect to keep a proper lookout or the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case." However, such a provision, which is also contained in other statutory navigation rules, the International Rules for Navigation at Sea; the Navigation Rules for Harbors, Rivers and Island Waters, etc., the Great Lakes Rules, the Western River Rules, (See 33 U.S.C.A. §§ 121, 221, 293 and 351) is construed not as a permit to disregard other express rules, but as requiring under some circumstances additional precaution. (The Rules of the Nautical Road, United States Naval Institute, 1954 edition, p. 321; Griffin on Collision, p. 514.) The rule which permits such disregarding is in the above statutory rules of navigation expressed as follows (with minor deviation): "In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above Rules necessary in order to avoid immediate danger." (See 33 U.S.C.A. secs. 112, 212, 292 and 349.) No such provision is contained in the regulation here involved. Nevertheless the right and under certain circumstances the

duty to depart from it must be read into said section. Appellant concedes that this must be so in extreme situations, e.g., when seawater pouring over the bow would wash a lookout placed there overboard. But there seems no good reason for such extreme restriction. In the Restatement, Torts, sec. 286, Comment C it is said: "Many statutes and ordinances are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment. . . . The provisions of statutes, intended to codify and supplement the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede." We think this manner of construction is the only reasonable one also in the situation before us. Although the statutory rules cited before require only the keeping of a proper lookout, and that only by implication (The Rules of the Nautical Road, supra, p. 357; Griffin on Collision, p. 262) the cases have without reliance on regulation 62.25(a), supra, long since required the lookout to be stationed as far forward and near the water as possible, to wit, at the bow. (The Manchioneal, 243 Fed. 801, 805; U.S. v. The Adrastus, 190 F.2d 883, 886; 15 C.J.S. Collision, sec. 108(d), pp. 114-115; The Rules of the Nautical Road, supra, p. 365; Griffin on Collision, 271-272.) However, this rule is not maintained rigidly, when the weather makes another position more suitable. (Oriental Trading & Transport Co. v. Gulf Oil Corp., 173 F.2d 108, 111.) In The Kaiserin Maria Theresa, 149

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Fed. 97, 99, it was held that the coldness of the spray which flew aboard the steamship to freeze on the forward part of the vessel was a circumstance which justified removal of lookouts from there. Compare also Puratich v. United States, 126 F.2d 914, 916, where the trial court held that under the circumstances there prevailing the lookout's post on the bridge was as good as, if not better than, a position at the bow. It would seem that, even if regulation 62.25(a) governs in this case, there remains the same possibility of departure as under the case law cited. Appellant cites many cases, among which Belden v. Chase, 150 U.S. 674, 698, 699, supra, which require strict adherence to rules for preventing collision and permit departure only to avoid impending peril. However these cases relate to rules of true navigation on the compliance with which other ships must be able to rely. The same rationale does not apply to the position of the lookout, and we can not accept that there exists a right or duty unnecessarily to endanger the life or limbs of a seaman by strictly keeping to the position of the lookout in the bow in situations when the advantage of such position does not justify the risk involved for the seaman. The duty to provide a seaman with a reasonably safe place in which to work is enforced under the Jones Act. The failure to provide a seaman with a safe place to work can be present in many forms. (2 Norris, The Law of Seamen, § 688; Hanson v. Luckenbach S. S. Co., 65 F.2d 457; Persson v. James Griffiths & Sons, Inc., 85 Cal. App. 2d 672, 673.) It certainly includes the subjecting of a seaman to risks not justified by the object to be accomplished. In Matson Navigation Co. v. Hansen, 132 F.2d 487, 488, it is said: "Obviously, the test of reasonable safety varies with the prevailing conditions. No liability flows from requiring a sailor to perform his necessary sailor's duties with the ship rolling and lurching in a

heavy storm, even though he may be injured from a fall caused by a wave sweeping across the deck. Yet the owner would be liable if, instead of performing some necessary duty he was injured when sent by the mate across the same wave swept deck to rescue the ship's cat. The test is whether the requirement of the sailor is one which a reasonably prudent superior would order under the circumstances." The question presented in this respect in our case is: would a reasonably prudent superior, because of his duty to guard the reasonable safety of the sailor, under the circumstances proved have departed from the rule that the lookout should be in the bow?

A statement of some of the evidence is now required. On the night of February 27, 1951, the vessel after having delivered a load of cement at Honolulu was returning without cargo. Oil and water had been taken in the aft part of the ship. It left Honolulu shortly after 10 P.M.; the accident happened at 12:25 A.M. (0025) February 28, some 25 or 30 nautical miles from Honolulu on the way to San Francisco. At 11 P.M. the witness Jones, then on lookout duty, had called the skipper on the telephone and told him it was pounding and banging real hard. The master only hung up the telephone. Jones testified "it was blowing very bad and the ship was banging" and "bucking the seas" so that he had to hang on to the gunwale. The pitching and pounding was getting worse all the time. Plaintiff was one of the three men who had the midnight to four o'clock watch. Under ship routine one is standing lookout, one going to the wheel, one acting as standby and they rotate these activities themselves during the watch. Plaintiff first acted as lookout at midnight. The ship's log for midnight showed: "Scattered clouds. Rough easterly sea and swells. Vessel pitching considerably at times. Good visibility." When plaintiff reached

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the forecastle head where the lookout stood a few minutes before twelve the ship, according to his testimony, was pounding up and down, jumping up and down quite heavy. When the empty ship with nothing in the forepart hits the sea she takes a tremendous bang. He could not walk and keep his balance at the forecastle head. He stationed himself just ahead of the forepeak hatch taking hold of one of the dogs (hatch cover fasteners about 15 inches above the deck.) The wind prevented him from standing closer to the stem of the vessel; it was too windy to keep his eyes open. Before he fell there were seven or eight bounces all bad but then a tremendous one and when the ship came down he was wrenched from his hold of the dog and fell against it. Although plaintiff felt sick he remained on the lookout until he was relieved at 5 minutes to one. He then went amidship. The ship log shows that at 1:20 he reported his earlier fall. He did that to the officer who was at the wheel. He did not use the telephone like Jones. At 0029 the propeller speed was reduced from 77.7 revolutions per minute to 65 and at 0030 increased again to 70. At 1:25 filling of the No. 2 port and starboard tanks with water began. There remained log entries as to considerable pitching and occasional pounding.

Over and above this evidence there was much evidence as to custom and as to past experience with respect to the taking of the lookout from the bow to the bridge in bad weather and also opinion evidence as to good seamanship in that respect. So far as this evidence was offered by plaintiff and in his favor it was mostly objected to. In the opinion of plaintiff (an able bodied seaman who had followed the sea since 1914 and in war time had acted as temporary third and second officer) the conditions prevailing at the time of the accident required removal of the lookout to the top bridge where he would be protected. That would accord with

the custom of the sea and the customary practice on ships like the Permanente Silverbow and other ships. Coast Guard Regulation 62.25(a) was so interpreted by seamen. The order for removal would come from the officer of the watch. Seaman Jones (8 years at sea) testified by deposition that his experience was that under similar circumstances the officer on duty would call the lookout to the flying bridge. It was the duty of said officer to look out for the man on the bow in that manner.

Earl Condon, a master mariner with 20 years experience, gave as his opinion based on the ship log that the speed changes were a customary trying for a speed where the ship might perform better; the taking of ballast was to get her down deep enough in the water so that she would wear easily. It would make the ship behave better. When a ship is pitching considerably, reducing speed and ballasting is the natural thing to make it ride easily. Going at the speed she went, being light, she would slap down and strike with tremendous force and with the bow six feet higher than the stern there would be considerable strain and a very uncomfortable ship. The taking of ballast would reduce pounding and heaving and so would reduction of speed. He testified at length as to the normal placing of the lookout forward but that for different reasons he is taken off the bow to the bridge, among which pitching heavily so that there is a chance of his being injured. This is done at least when the visibility is good. In the situation here present good seamanship would have placed the man on the bridge. On the bridge the pendulum action of the sea is reduced. A man who has to hang on to keep from being thrown down can not maintain a lookout as required.

De Pinto, a master mariner 15 years at sea, also gave as his opinion, after examining the log of the Permanente Silverbow, that on such a ship under such conditions the

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lookout should be situated on the bridge because it is dangerous for the personnel to keep their footing down there and when the sea is pounding considerably he could not keep a proper lookout. "The rules of the road simply states 'a proper lookout' based on the practice of seamanship and the special circumstances of the case. Consequently, the practice of seamanship, a pounding vessel, the special circumstance of the case, the proper lookout is up on the bridge."

The Captain of the Permanente Silverbow conceded that under the Coast Guard regulations he had discretion as to when he can move the lookout to the bridge. The discretion was mainly exercised by the officer in charge of the watch. It was mainly used immediately when the lookout was going to get wet from spray coming over, even if not actually necessary, but hardly ever for pounding.

In urging that the above evidence does not support the verdict, appellant first contends that no order to stand lookout on the forecastle was proved but that plaintiff worked there voluntarily. Respondent's position that the ship's routine constituted an implied order must be accepted, the more so as it was conceded that it was for the officer of the watch to take plaintiff from the forecastle. So long as no such order had been given there was an implied order to stand on the forecastle.

Appellant further urges that the fall was an ordinary risk of the seaman's dangerous employment which the seaman is considered to have assumed. (The Iroquois, 194 U.S. 240, 243.) As we said before, citing the Matson Navigation Co. case, this is the crux of the matter: was it a necessary risk or a risk that the officer should have avoided. In the evidence stated there is substantial evidence to the latter effect.

Appellant also contends that there was no evidence at all of negligence in navigation causing the injury. Respondent does not stress this side of the negligence question much. It is true that there was no express expert evidence that the navigation was faulty, but could this not be inferred from the evidence that the ship was going with unreduced speed and without ballast, although it was empty of cargo and had only some load aft and that after the accident had taken place speed was diminished and ballast taken in? It is true, however, that there was hardly any evidence that if these measures had been taken earlier the accident would not have taken place. At any rate the evidence showing negligence in not placing plaintiff on the bridge sufficiently supports the decision. For application of the substantial but conflicting evidence rule in a Jones Act case see Guay v. American President Lines, 81 Cal. App. 2d 495, 508.

Appellant contends that under federal rule here applicable the case should not have gone to the jury, citing Brady v. Southern Ry. Co., 315 U.S. 476. It is true that what should be submitted to the jury in the Jones Act and Federal Employers Liability Act cases (like the Brady case) is considered a federal question. (Carpenter v. Atchison, T. & S. F. Ry. Co., 109 Cal. App. 2d 18, 21; Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359.) However the later United States Supreme Court cases show that the court considers jury trial as a most important part of the rights provided for by said two statutes and that it is disinclined to take cases from the jury or to reverse jury decisions either because of insufficiency of the evidence or failure of the complaint to state sufficient facts for negligence. See the New Supreme Court and the Old Law of Negligence, 18 Law and Contemporary Problems, 110; A Decade of Progress under the Federal Employers' Liability Act, idem.,

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p. 257; Anderson v. Atchison T. & S. F. Ry. Co., 333 U.S. 821, reversing Anderson v. Atchison T. & S. F. Ry. Co., 31 Cal. 2d 117; Lavender v. Kurn, 327 U.S. 645, 653.) In the Lavender case it is said: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." Our case is not one of the very exceptional cases where under such federal rule the case should have been taken from the jury or now reversed because of insufficiency of the evidence.

Next appellant contends that opinion evidence as to where a lookout should be placed under the circumstances of the case, about the custom of the sea as to such placing and as to the meaning of the Coast Guard regulation, was erroneously admitted together with evidence as to former experience as to the placing of lookouts, all for the purpose of nullifying the Coast Guard ordinance 62.25(a), which as statutory law should have been interpreted by the court only.

Many cases are cited to the effect that custom can not abolish plain requirements of law or of regulations with force of law. However, as stated before, there is here no plain, uninfringible rule of law, if ordinance 62.25(a) is a rule of law governing civil responsibility at all. A right to deviate under special circumstances for the safety of the lookout must be recognized and under what circumstances a reasonable master would deviate and whether these cir-

cumstances were present are jury questions. They have some resemblance to the question of excuse for violation of traffic statutes which without excuse is negligence per se. In Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 590, it is said, quoting from Scalf v. Eicher, 11 Cal. App. 2d 44, 54: "'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where ". . . the court is impelled to say that from the facts reasonable men can draw but one inference. . . ."'" The question whether in this case the matter was for the court or the jury must be decided according to federal law. Although the parties do not cite any decisions under federal law similar to the Satterlee case there seems little doubt that by the preference of the United States Supreme Court for jury decisions in Jones Act and Federal Employers Liability Act cases the same rule must be accepted. So it was held in Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, that although Ohio law required matters of fraud in the obtaining of a release to be tried partly by the court such could have no application in a Federal Employers Liability Act case where all factual issues had to be decided by the jury. In Anderson v. Atchison T. & S. F. Ry. Co., 31 Cal. 2d 117, our Supreme Court decided in such a case as a matter of law that there was no duty to use ordinary care to ascertain the whereabouts of one who was missing from the train on which he was employed. The United States Supreme Court reversed, holding without determining the question of law that if the matter had gone to the jury the evidence might have "revealed a situation as to which a jury under appropriate instructions could . . . have found that decedent's exposure and consequent death were due 'in whole or in part' to fail-

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ure of respondent's agents to do what 'a reasonable and prudent man would ordinarily have done under the circumstances of the situation.'" In Pierro v. Carnegie-Illinois Steel Corp. 186 F.2d 75, an action under the Jones Act, in which the inspection certificate of the Coast Guard required four firemen to be in service and the master proceeded to home port with only three firemen after one became ill, it was held that the issue whether the master had exercised an unreasonable judgment could not be answered as a matter of law but was rather properly a matter for the trier of fact in the first instance. The above cases show a tendency to eliminate as much as possible questions of law and to treat the whole matter as a question of conduct of a reasonable man for the jury.

In such matters evidence as to customary standards of conduct is admissible in cases relating to injury to seamen as well as in other negligence cases, although in neither is such evidence conclusive of the standard of due care in relation to negligence. (65 C.J.S. 1047, et seq. Negligence § 232; 38 Am. Jur. 1015, Negligence § 317; II Wigmore on Evidence, § 461, 488; Sieracki v. Seas Shipping Co., 149 F. 2d 98, 100; 79 C.J.S. Seamen §§ 212-213, p. 74, et seq.; 48 Am. Jur. Shipping, §§ 186-187, p. 130.) Custom or usage is a matter of fact to be testified to as such by witnesses qualified by adequate knowledge. It can be proved by instances or by direct testimony of its existence by such witnesses. (32 C.J.S. Evidence, § 483, p. 139; Ames Mercantile Co. v. Kimball S.S. Co., 125 Fed. 332, 336.) Moreover in nautical matters expert evidence is admissible as to what good seamanship required under the circumstances of the case. (48 Am. Jur. 374; 32 C.J.S. 332; Union Ins. Co. v. Smith, 124 U.S. 405.) Such evidence can in the discretion of the trial court also be admitted as to the ultimate issue in the case if expert opinion as to it is required and cannot

practically be restricted to a separate part of it. (Hamilton v. United States, 73 F.2d 357, 358, 359; VII Wigmore on Evidence, § 1921 and compare Casey v. Seas Shipping Co., 178 F.2d 360, 362.) Nevertheless it may be conceded that in the admission of the evidence complained of the above rules were not always correctly followed and distinguished. However, whatever irregularity there may have been in that respect was of form more than of substance. Those who testified as to custom of the sea and/or good seamanship had sufficient experience to know the facts as to custom and to give their opinion as to good seamanship. We are convinced that the not always correct wording of their testimony was not prejudicial.

Appellant especially complains of the fact that witnesses were permitted to testify what the ordinance meant and in how far there was a discretion to deviate from it. It is said correctly that this was a matter of law for the court to rule on by instruction and that no such testimony should have been admitted. Although this seems correct, again we think the error was not prejudicial. The matter can best be treated together with appellant's grievances with respect to instructions which are closely related to it.

It must first be pointed out that the court read the ordinance 46 CFR 62.25(a) literally to the jury with an instruction that such Coast Guard regulations have force and effect of law. The court also gave an instruction on the duty to furnish a reasonably safe place to work. Moreover, there is an instruction (from B.A.J.I.) which requires conscientiousness and ordinary care in the management of a ship and states that whether ordinary care was used must be determined in the light of the then known facts, practices and experiences of the business, the accumulated knowledge of the trade, the prevailing view of experts, the necessities

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of the situation, and all practical considerations involved. Appellant objects to the instruction on the duty to furnish a reasonably safe place to work, but the objection is without merit. It is said that the instruction is outside the issues as only a negligent order to stand lookout on the forecastle was alleged. Evidently the gravamen of the complaint is that the plaintiff was ordered to stand watch (work) in an unsafe place. The duty to furnish a reasonably safe place to stand watch was a duty which the master had to weigh against the duty under the ordinance and an instruction on both was therefore required. What seems objectionable is that there is no instruction on the relation between the rule of the ordinance and the reasonable safety of the watchman, custom, experience, due care, etc., but this is not pointed out as error. Appellant complains of the giving of a further instruction to the effect that the jury should consider opinion evidence of experts and must resolve the conflicts in their testimony concerning the customs of the sea. It is said that the jury could apply this rule to the testimony given by expert witnesses as to the meaning of the ordinance and the discretion to deviate from it, and could on this basis replace the ordinance by the prevailing expert opinion as to the customs of the sea. Although the instruction does not specifically relate to that matter it could possibly also be applied to it. However, it could not eliminate the express instruction given as to the force of law of the ordinance, an instruction in its unmitigated form possibly even too favorable to appellant. It has already been said that the admission of evidence as to the meaning of the ordinance was error and that the court should have instead instructed on the interrelation of the different rules and elements involved. However, the statements made by the witnesses as to this matter were to the general effect that as a rule the

lookout should be placed in the bow, but that for different reasons, among which danger for the safety of the lookout, deviation was permitted. These statements are generally in accord with what we have found to be the law and although they were stated to the jury by witnesses instead of by the court, we do not consider this prejudicial. Also if the court had instructed on the general rule as to deviation under special circumstances, evidence as to custom and good seamanship with respect to specific circumstances of such kind would have remained admissible and necessary. We hold that the technical errors do not require reversal.

Appellant's further complaint concerning an instruction given to the effect that the Jones Act gives an action for injuries caused by negligence of the employer and his agents or by a defect or insufficiency in appliances, boats and equipment caused by such negligence, although in this case no such defect was involved, is wholly without merit. Such introductory instruction is evidently not prejudicial. (Guay v. American President Lines, 81 Cal. App. 2d 498, 516.)

Judgment affirmed.

NOURSE, P. J.

We concur:

DOOLING, J.

KAUFMAN, J.

[Endorsed]: Filed Dec. 17, 1954. Walter S. Chisholm, Clerk. By L. R. E., Deputy.

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In the District Court of Appeal of the State of California
First Appellate District, Division Two

Civil No. 16034

Henry Peterson,
Plaintiff and Respondent,
vs.
Permanente Steamship Corporation,
Defendant and Appellant.

By the Court:

The petition for a rehearing is denied.

NOURSE, P. J.

Dated: January 14, 1955

[Endorsed]: Filed Jan. 14, 1955. Walter S. Chisholm, Clerk. By L. R. E., Deputy.

Order Due Feb. 15, 1955

Order Denying Hearing After Judgment by District Court of Appeal, 1st District, Division 2, Civ. No. 16034

In the Supreme Court of the State of California

In Bank

Peterson

vs.

Permanente Steamship Corporation

Appellant's petition for hearing denied.

Edmonds, J.
Schauer, J.
and
Spence, J. are of the opinion that the petition should be granted.

Gibson
Chief Justice

[Endorsed]: Filed Feb. 10, 1955. William I. Sullivan, Clerk, by Joseph M. Rogers, S. F. Deputy.

(Appendix B Follows)

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Appendix B

ADDITIONAL STATUTES AND REGULATIONS INVOLVED

The Jones Act, 46 U.S.C. § 688 (1952 edition, p. 6711):

"§ 688. *Recovery for injury to or death of seaman.*

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers Liability Act, 45 U.S.C., § 51 (1952 edition, p. 6480):

"§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

"Every common carrier by railroad while engaging in commerce between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury

while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"An employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

46 U.S.C., § 381 (1952 edition, p. 6641):

"§ 381. *Regulations as to passing steamers.*

"The Commandant of the Coast Guard shall establish such regulations to be observed by all steam-vessels in passing each other, as he shall from time to time deem necessary for safety; two printed copies of such regulations, signed by him, shall be furnished to each of such vessels, and shall at all times be kept posted up in conspicuous places in such vessel.

"Every pilot, engineer, mate, or master of any steam vessel who neglects or wilfully refuses to observe the regulations established in pursuance of this section, shall be liable to a penalty of $50, and for all damages sustained by any passenger, in his person or baggage, by such neglect or refusal.

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"The provisions of this section shall not apply to steam vessels navigating the harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries."

46 U.S.C. § 367 (1952 edition, p. 6638):

"§ 367. *Seagoing vessels propelled by internal-combustion engines.*

"Existing laws covering the inspection of steam vessels are hereby made applicable to seagoing vessels of three hundred gross tons and over propelled in whole or in part by internal-combustion engines to such extent and upon such conditions as may be required by the regulations of the Commandant of the Coast Guard.

* * * * * * *

"The term 'seagoing vessels' as used in this section shall be construed to mean vessels which in the usual course of their employment proceed outside the line dividing the inland waters from the high seas as designated and determined under the provisions of Section 151 of Title 33."

46 C.F.R. § 78.30-1 (Revised 1952, p. 552):

"*Lookouts required.* (a) All ocean and coastwise vessels shall have a lookout at all times at or near the bow during the nighttime."

46 C.F.R. § 97.27-1 (Revised 1952, p. 622):

"*Lookouts required.* (a) All ocean and coastwise vessels shall have a lookout at all times at or near the bow during the nighttime."

(Appendix C Follows)

Appendix C

QUOTATIONS FROM THE RECORD SHOWING QUESTIONS PRESENTED WERE TIMELY RAISED

1. Objections to Evidence.

Following are passages containing the objections to evidence as to custom and good seamanship introduced in order to nullify 46 CFR § 62.25(a).

(a) During direct examination of Peterson:

"Q. Mr. Peterson, what has your experience been at sea aboard vessels of this or similar nature, as to where the lookout stands watch when the vessel is pitching, or bouncing, or pounding, as it was on the night of February 27, 1951?

"Mr. Appel: To which we object, if your Honor please. There is no proper foundation laid. And I think perhaps we had better have a conference with you outside of the presence of the jury.

"The Court: We will take a recess now.

"(Whereupon, after the customary statutory admonition had been given them, the jury were excused from the courtroom and the following proceedings were had outside their presence and hearing:)

"Mr. Appel: Under the provisions of Section 375 of U. S. Code Annotated, Title 46, it provides that (reading):

> 'The Commandant of the Coast Guard shall establish all the necessary rules required to carry out in the most effective manner the provisions of Title 52 of Revised Statutes, and also regulations prohibiting useless or unnecessary whistling, and such regulations shall have the force of law.'

"The Regulations of the Commandant are contained in what is known as CG-170 * * * And this provides, Judge,--

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I will turn it over to you to read to yourself. You can follow it more closely, then as I read it (handing document to the Court).

"Instruction 62.25 (reading):

> 'All vessels navigating the ocean during the night time shall have a lookout at all times at or near the bow. Nothing in this section shall exonerate any master or officer in command from the consequences of any neglect to keep a proper lookout or the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.'

"Now, that has become, Judge, a positive statute, and it merely follows the common law of the sea; has embraced all cases, without exception, going back many, many years. If it becomes necessary to cite authorities, I have the applicable authorities.

"Mr. Hooey: Our position is this, your Honor: Section 62.25, which your Honor is looking at, says (reading):

> 'All vessels navigating the ocean during the night time shall have a lookout at all times at or near the bow.'

"Now, that is a true Coast Guard regulation. However, it does not have the force and effect of law. It is contrary to the law itself, and Mr. Whelan has a number of cases directly in point which state, in effect, that it is all right for the Coast Guard to make rules and regulations in so far as it don't change the substantive law.

"The cases hold—and some very recent ones—one is a United States Supreme Court case that says the only thing the law says, that there shall be a proper lookout, but where the lookout would be depends on the safety of the ship and the safety of the crew.

"Now, we take the position that this regulation is contrary to law, not only as an actual legal matter, but from a factual standpoint." (R. 76-78)

* * * * * * *

"Mr. Hooey: Q. Mr. Peterson, resuming from yesterday, do you have an opinion as to where the lookout should be stationed aboard a ship such as the Permanente Silverbow when the ship is pitching and pounding in the manner that you testified to yesterday that the Silverbow was doing between the hour of 12:00 and 12:30 midnight of February 28, 1951?

"Mr. Appel: To which I object on the ground there is no proper foundation laid, calls for self-serving declaration, incompetent, irrelevant and immaterial.

"The Court: Overruled. You may answer.

"The Witness: On the top bridge, sir.

"Mr. Hooey: Q. Now, where is the top bridge?

"Mr. Appel: Your Honor, objection, of course, in view of the discussion we had in respect to the statute and regulation yesterday that the reporter took down in your chambers, and also as to the form of this particular question. I think that that was wrong, as well. However, your Honor has overruled the objection and the answer has been made. I don't desire to insist on repetition, I merely want to reserve my rights in that regard.

"The Court: Very well." (R.104)

* * * * * * * *

"Mr. Hooey: Q. Mr. Peterson, so you understand, the question is, what is your opinion as to the reason why the lookout should be on the top bridge when the ship is pitching and pounding as it was on the midnight of February 28th?

"Mr. Appel: Same objection heretofore urged, if the Court please, on the grounds it is repetition.

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"The Court: No, that wasn't, in the form of the question as I understood it. That was by way of explanation to the witness what they were trying to direct his attention to, so you can proceed to answer, if you can, Mr. Peterson, as to why you gave the opinion that under the circumstances you found existing there at this time the lookout should have been stationed on the bridge or top bridge, as you call it. Just direct your answer solely to the reason that you think that should be done, if you do have any reason.

"Mr. Appel: May it be understood I have the same objection to your Honor's questions?

"The Court: Yes, certainly.

"The Witness: Because it was in danger to be on the forecastle head, especially on that night when the weather was so bad, bouncing and pitching up there." (R. 105, 106)

* * * * * * * *

"Q. Now, Mr. Peterson, what is the custom of the sea as to where the lookout is stationed when a ship such as the Permanente Silverbow is pitching and pounding to the extent that you have testified she was pitching and pounding at midnight, or between the hour of 12:00 midnight and 12:30 on February 28th of 1951?

"Mr. Appel: To which I object on the grounds heretofore urged, your Honor, without repeating them, if it is convenient to your Honor.

"The Court: Overruled.

"Mr. Appel: I think you understand the position I take, in view of the law?

"The Court: Yes; overruled.

"The Witness: On the top bridge." (R. 108, 109)

* * * * * * * *

"Mr. Hooey: Q. This regulation was read to you, Mr. Peterson?

"Might it be understood that I am questioning the witness with reference to this, but reserving the objection that I made, your Honor?

"Mr. Hooey: 'All vessels navigating the ocean during the nighttime shall have a lookout at all times at or near the bow. Nothing in this section shall exonerate any master or officer in command from the consequences of any neglect to keep a proper lookout, or the neglect of any precaution which may be required by the ordinary practice of seaman or by the special circumstances of the case.'

"Q. How do you seamen interpret that section 62.25?

"Mr. Appel: To which I object on the grounds it calls for opinion and conclusion, attempt to alter the statutory law of the land.

"The Court: Overruled.

"The Witness: Well, in our interpretation, and we do that in the practice of the seas so long that it has been followed that we are on the forecastle, we are required to be on the bow of the ship when weather is permitting and there is no danger to us, but as soon as there is danger to us they usually call us up to come on the bridge and stand lookout. That is the way it has been going, so far as I can remember, back in the years ago." (R. 196, 197)

(b) During reading by counsel for Peterson of the deposition of witness Jones:

" 'Q. Now, Mr. Jones, again keeping in mind and basing it upon your experience aboard vessels from the time that you started sailing and up to the time of the accident to Mr. Peterson, and keeping in mind the manner in which the vessel was riding on this night, what has your experience been as to where the man or men stand watch aboard this vessel?'—

"Mr. Appel: Objected to on the grounds it is incompetent, irrelevant and immaterial, and no proper foundation.

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"The Court: Overruled.

"(Whereupon the deposition was continued to be read, Mr. Whelan reading the questions and Mr. Hooey reading the answers, as follows:)

"'A. Well, the lookout is supposed to be protected. Any time it is banging like that, like this vessel was, or else it is taking spray over the bow, or even on the decks coming down, the mate always—all you do is just call up the mate and tell him, "Well, it is pounding real bad," or "It is taking spray," and he will say, "Well, come up on the flying bridge." '—

"Mr. Appel: Move to strike the answer as not responsive to the question.

"The Court: No; it may stay in." (R. 313, 314)

* * * * * * * *

"'Q. What is your experience, then, as to what the custom of the sea is as to whether a man stands watch on the flying bridge or the forepeak when the weather is of the condition that is was on this night and the ship was riding in the manner that it was on that night?'—

"Mr. Appel: Objected to on the grounds heretofore stated, without repeating them.

"The Court: Overruled.

"(Whereupon the deposition was continued to be read, Mr. Whelan reading the questions and Mr. Hooey reading the answers, as follows:)

'A. That is up to the officer in charge that is on watch. It is his duty to look out for the man on the bow. If it is pounding or taking seas, then he is supposed to call him up.

'Q. When you say "call him up," what do you mean'?—

"Mr. Appel: The same objection.

"The Court: The same ruling.

"(Whereupon the deposition was continued to be read, Mr. Whelan reading the questions and Mr. Hooey reading the answers, as follows:)

'A. Call him up on the flying bridge to stand the lookout.'" (R. 315, 316)

(c) During direct examination of Peterson's witness, De Pinto.

"Q. Now, do you have an opinion, Mr. De Pinto, as to where the lookout should stand at night time on a ship such as the *Permanente Silverbow*, a Victory ship, running light, without cargo, proceeding in a northeasterly direction with rough easterly seas and swells, vessel pitching considerably at times, and good visibility, as to where the lookout should be stationed?

"Mr. Appel: To which we object on the ground there is no proper foundation laid. It is not the subject of expert testimony. And further, it is an attempt to contradict the statutory law of the sea.

"The Court: Overruled.

"Mr. Hooey: Q. Would you answer?

"A. Yes. Under those conditions that you have stated I would have him up—

"Mr. Appel: We haven't stipulated to it.

"A. (continuing)—as he told me—I would have him up on the bridge.

"Mr. Hooey: Q. Why on the bridge and not on the bow?

"Mr. Appel: The same objection.

"The Court: The same ruling.

"A. Because it is dangerous for the personnel to keep their footing down there, and for the simple reason when the sea is pounding considerably he couldn't keep a proper lookout, which is the rule of the road—we must maintain a proper lookout. That's one of the most important rules of the road.

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"Mr. Hooey: Q. With visibility good, can you state whether or not a lookout on the bridge could perform his duties as a proper lookout?

"Mr. Appel: The same objection.

"The Court: The same ruling.

"A. The rules of the road simply state 'a proper lookout,' based on the practice of seamanship and the special circumstances of the case. Consequently, the practice of seamanship, a pounding vessel, the special circumstances of the case, the proper lookout is upon the bridge." (R. 330, 331)

2. Denial of Petitioner's Motion for Directed Verdict.

"Mr. Appel: The defendant rests, your Honor. Before we proceed with the argument, your Honor, I have a motion to make.* * * (Whereupon the Court, counsel for the respective parties and the court reporter retired to chambers and a motion for a directed verdict was made by Mr. Appel on behalf of the defendants outside the presence and hearing of the jury, said motion being denied by the Court, after which the Court, counsel for the respective parties and the court reporter returned to the courtroom and the following proceedings were had within the presence and hearing of the jury:)

"The Court: Mr. Hooey, proceed with your argument." (R. 404, 405)

3. Instructions Excepted to by Petitioner.

(a) "The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in

which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound." (R. 420)

(b) "Now, in this case there has been a conflict in the testimony of expert witnesses concerning the customs of the sea, and you must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified. Thereupon, you shall find in favor of that expert testimony which, in your opinion, is entitled to the greater weight." (R. 420)

(c) "A continuing duty exists on the part of a steamship corporation, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required by that duty varies in direct proportion to the dangers known to be involved in the work. To put the matter in another way, the amount of prudence required of a steamship company in the exercise of ordinary care, to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers that reasonably should be apprehended.

"In the absence of knowledge or notice to the contrary, and in the absence of circumstances that caution him, or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption." (R. 413, 414)

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